



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

May 6, 2003

Mr. Brad Norton  
Assistant City Attorney  
City of Austin - Law Department  
P.O. Box 1546  
Austin, Texas 78767-1546

OR2003-3055

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180520.

The City of Austin (the "City") received a request for documents related to a permit application by the City to the Texas Commission on Environmental Quality ("TCEQ"). The City has released some of the information to the Requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code, Rule 503 of the Texas Rules of Evidence, and Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. We have considered the exceptions you claim and reviewed the submitted information.

We first address your section 552.107 claim with respect to Document Nos. 1-42 and 75-90. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins.*

*Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning one that was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). We determine the applicability of section 552.107(1) on a case-by-case basis. We note that section 552.107 does not encompass Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. *See Open Records Decision No. 676 at 4 (2002).*

Upon careful review of your arguments and the submitted materials you seek to withhold, we agree that, except for the information we have marked in Document No. 25, the responsive information contained within Document Nos. 1-42 and 75-90 is excepted under section 552.107.<sup>1</sup> The information we have marked in Document No. 25 is information subject to section 552.022 of the Government Code. This section provides several categories of information that are not excepted from required disclosure unless they “are expressly confidential under other law.” In pertinent part this section reads

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

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<sup>1</sup> As we are able to make this determination, we need not address your section 552.111 claim with respect to the responsive information contained within Document Nos. 1 - 42 and 75 - 90.

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The portion of Document No. 25 that we have marked includes information in an account, voucher, or contract relating to the expenditure of public or other funds by a governmental body that must be released under section 552.022 unless it is expressly confidential under other law. Although the City raises section 552.107 of the Government Code with regard to this information, section 552.107 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. As such, it is not "other law" that makes information confidential for purposes of section 552.022. *See* Open Records Decision No. 630 at 4 (1994) (governmental body may waive attorney-client privilege under section 552.107(1)); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are "other law" within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). The Court did not include the Texas Disciplinary Rules of Professional Conduct as other law. Hence, the City may not withhold the information under Rule 1.05. We must now determine whether the information to which section 552.022(a)(3) is applicable is nonetheless confidential under Rule 503.

Texas Rule of Evidence 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App. Houston [14th Dist.] 1993, no writ).

After reviewing your arguments and the information to which section 552.022 is applicable, we conclude that none of the records constitute confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.

Next we address your section 552.111 claim with respect to Document Nos. 43 - 74 and 91. Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception applies not only to internal memoranda, but also to memoranda prepared by consultants of a governmental body. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981). In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; Open Records Decision No. 615 at 4-5 (1993).

You state that Document Nos. 43 - 74 and 91 contain recommendations of City personnel that reflect the internal advice, opinions, and deliberations of City staff on a policymaking

matter. Upon review, we agree that much of the submitted information consists of communications among agency staff that consist of advice, opinions, and recommendations reflecting the policymaking and deliberative processes of the City.

However, we have determined that section 552.111 does not apply to part of Document No. 70. This office has concluded that where a preliminary draft of a policymaking document has been released or is intended for release in final form, factual information in that draft which also appears in a released or releasable final version is excepted by section 552.111. Open Records Decision No. 559 at 2 (1990). Moreover, severable factual information appearing in the draft but not in the final version is not excepted by section 552.111. *Id.* Document 70 includes a brochure that represents the final form of the City's public policy statement on the City's efforts to secure a bed and banks permit. You state the actual brochure has not been released, and you do not indicate that it is intended for release in final form. Thus, the City must release the factual information contained within the actual brochure. The City may withhold the rest of the brochure under section 552.111.

Document 91 is an interagency document. When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

Upon review of the information you seek to withhold under section 552.111, we conclude that with regard to the document at issue, the City and the LCRA do not share a privity of interest or common deliberative process with regard to the policy matter at issue. The LCRA has opposed the City's application for a bed and banks permit. We therefore conclude that you may not withhold Document No. 91 under section 552.111. Thus, Document No. 91 must be released.

Accordingly, we determine that the City may withhold much of the submitted information from disclosure pursuant to section 552.111 of the Government Code. We have marked the information that is not advice, opinions, and recommendations reflecting the policymaking processes of the City and may not be excepted under section 552.111.

Lastly, we also note that the information not excepted under sections 552.107 and 552.111 contains e-mail addresses obtained from the public. Section 552.137 makes certain e-mail addresses confidential. Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials to be released. The City must, therefore, withhold the e-mail addresses of members of the public that we have marked under section 552.137.

In summary, the City may withhold most of the information under sections 552.107 and 552.111. We have marked the information the City must withhold under section 552.137 of the Government Code. The City must release the remaining marked information and the information that the City does not seek to withhold.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert F. Maier".

Robert F. Maier  
Assistant Attorney General  
Open Records Division

RFM/seg

Ref: ID# 180520

Enc. Submitted documents

c: Mr. Stephen Scheibel  
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(w/o enclosures)